Supreme Court, U.S.
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No. _____

In the Supreme Court of the United States

UNITED STATES OF AMERICA *EX REL.*
BRUCE G. LOWMAN, M.D.,

Petitioner,

v.

HILTON HEAD HEALTH SYSTEM, L.P., ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Respondents Hilton Head Health System, Tenet Healthcare Corporation, and James Douglas Johnston, M.D., submitted false claims for reimbursement to Medicare pursuant to a scheme to have the United States pay for medically unnecessary cardiac and peripheral vascular catheterizations and associated services. The unnecessary procedures were performed at Hilton Head Regional Medical Center by Dr. Johnston, who subsequently had his medical license revoked and has been deported from the United States for fraud. The hospital did not possess the required certificate of necessity to safely perform therapeutic cardiac catheterizations.

1. 31 U.S.C. § 3731(b) contains two time periods to commence a civil action under the False Claims Act ("FCA"). The plain language of the statute authorizes a civil action to be brought not more than (1) six years after the date of the violation, or (2) three years after the date on which facts material to the right of action are known by the official of the United States charged with responsibility to act in the circumstances, but in no event more than ten years after the violation occurred, whichever is later. With misplaced reliance on *Graham County Soil and Water Conservation Dist. v. United States ex rel. Guarantee Wilson*, 545 U.S. 409 (2005), the United States Court of Appeals for the Fourth Circuit held that the six-year limitation period of 31 U.S.C. § 3731(b)(1) applied to the claims under the FCA and rejected the application of the three-year equitable

tolling provision of 31 U.S.C. § 3731(b)(2) to *qui tam* cases in which the United States has not intervened. This petition presents a threshold question of statutory construction whether the plain language of 31 U.S.C. § 3731(b)(2) allows a *qui tam* plaintiff to file an FCA complaint more than six years after the violation but within three years of notifying an "official of the United States charged with responsibility to act in the circumstances" where the United States has not intervened in the litigation.

2. Whether the district court failed to credit undisputed record evidence that Petitioner's claims were in fact filed within the six-year statute of limitations provided by 31 U.S.C. § 3731(b)(1).

PARTIES TO THE PROCEEDING

The Petitioner is Bruce G. Lowman, M.D., F.A.C.S.

The Respondents are Hilton Head Health System, L.P.; Tenet Healthcare Corporation f/k/a National Medical Enterprise and American Medical International; Tenet Physician Services—Hilton Head, Inc.; Hilton Head Medical Group—Cardiology, L.L.C.; and James Douglas Johnston, M.D., individually and as a member of the Medical Staff.

Taxpayers Against Fraud Education Fund filed an *amicus curiae* brief in support of Petitioner below.

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The opinion of the United States Court of Appeals for the Fourth Circuit is unreported, but can be found at No. 07-1485(L) (4th Cir. Nov. 18, 2008). (App. at 1a) The order denying the petition for rehearing en banc is also unreported, but can be found at No. 07-1485(L) (4th Cir. Jan. 20, 2009). (App. at 36a) The order of the United States District Court for the District Court of South Carolina is published at 487 F. Supp. 2d 682 (D.S.C. 2007). (App. at 3a)

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on November 18, 2008. The court of appeals denied Petitioner's timely petition for rehearing en banc on January 20, 2009. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Title 31 U.S.C. § 3731 provides, in relevant part:

> (b) A civil action under section 3730 may not be brought–
>
> > (1) more than 6 years after the date on which the violation of section 3729 is committed, or

> (2) more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances, but in no event more than 10 years after the date on which the violation is committed,
>
> whichever occurs last.

31 U.S.C. § 3731(b).

STATEMENT

Petitioner Bruce Lowman, M.D., F.A.C.S., on behalf of the United States of America, brought this *qui tam* action against Respondents under the False Claims Act, 31 U.S.C. §§ 3729-3722. The suit alleges false claims for Medicare reimbursement based on a scheme whereby the United States paid for medically unnecessary cardiac and peripheral vascular catheterizations, associated medical tests, and rehabilitation services performed on patients at Respondent Hilton Head Regional Medical Center.

The district court issued an order without oral argument granting summary judgment against Petitioner Lowman on the grounds that the complaint was filed "more than six years after the alleged violations occurred and more than three years after he knew the relevant facts." (App. at 34a) The judgment was affirmed by the Fourth

Circuit Court of Appeals on the grounds that the decision was controlled by *United States ex rel. Sanders v. North American Bus Indus., Inc.*, 546 F.3d 288 (4th Cir. 2008), which rejected the application of the three-year equitable tolling provision in 31 U.S.C. § 3731(b)(2) to *qui tam* cases in which the United States has not intervened. Rehearing en banc was denied.

This Petition presents a question of significant statutory construction, namely, does the three-year tolling provision of 31 U.S.C. § 3731(b)(2) apply to non-intervened cases litigated by *qui tam* relators on behalf of the government. Federal courts are in conflict on this issue with far-reaching implications affecting the ability of the United States to recover payments made by it as the result of fraudulent conduct. Some courts have construed section 3731(b)(2) to mean that relators may file within three years of the time when the government knew or reasonably should have known about the false claim. *See, e.g., United States ex rel. Pogue v. Diabetes Treatment Ctrs. of America, Inc.*, 474 F. Supp. 2d 75, 88-89 (D.D.C. 2007). Other courts have held that a relator must file within three years of when he or she first knew or reasonably should have known the facts material to the right of action. *See, e.g., United States ex rel. Hyatt v. Northrop Corp.*, 91 F.3d 1211, 1218 (9th Cir. 1996). Still other courts, including the Fourth Circuit below, have construed section 3731(b)(2) to mean that only the United States, and not relators acting on behalf of the government, are entitled to the benefit of the three-year equitable tolling provision. *See, e.g., United*

States ex rel. Sikkenga v. Regence Blue Cross Blue Shield of Utah, 472 F.3d 702, 724-25 (10th Cir. 2006); *Neal v. Honeywell*, 33 F.3d 860, 865-66 (7th Cir. 1994); *United States ex rel. El Amin v. George Washington Univ.*, 26 F. Supp. 2d 162, 171 (D.D.C. 1998). Resolving whether 31 U.S.C. § 3731(b)(2) applies to non-intervened cases is of exceptional importance as it affects the right of the United States, the real party in interest in *qui tam* cases, to recover damages based on actual fraud as a result of applying an artificially restrictive statute of limitations conflicting with the congressional intent to secure restitution. *See United States v. Bornstein*, 423 U.S. 303 (1976).

A. Background and False Claims of Respondents.

Petitioner Lowman is a vascular surgeon. He was hired in March 1997 by the Respondent Hilton Head Hospital, a healthcare provider located in South Carolina that is owned by Respondent Tenet Healthcare Corporation. At the epicenter of the false claims is Respondent James Johnston – a Canadian cardiologist who served as the Director of the Catheterization Laboratory at the hospital. During the period that the false claims were made, Respondent Johnston suffered from substance abuse affecting his job performance that resulted in the revocation of his license to practice medicine. The South Carolina Medical Board filed a formal complaint against him in April 2002 alleging that he "engaged in dishonorable, unethical, or unprofessional conduct that is likely to deceive,

defraud, or harm the public as evidenced by . . . his inappropriate and unprofessional routine activities in the Heart Catheterization Lab at Hilton Head Hospital. . . ." The Board issued an order on August 10, 2005, sanctioning Respondent Johnston with an indefinite suspension. Shortly after having his licensed revoked, a federal grand jury indicted him on a felony count of falsely representing himself to be a citizen in violation of 18 U.S.C. § 911. He pleaded guilty and was sentenced to three years probation and ordered to surrender to the Immigration and Naturalization Service for deportation. The United States subsequently deported him.

Petitioner Lowman was informed by a hospital administrator that Respondent Johnston was performing medically unnecessary cardiac and vascular catheterizations in the hospital's diagnostic Catheterization Laboratory. The unnecessary procedures were billed to the United States, and resulted in false claims for reimbursement because of lack of medical necessity. Petitioner Lowman personally observed the fraud. The complaint includes detailed allegations about the unnecessary procedures. Other allegations include false claims whereby Respondent Johnston would intentionally misrepresent medical records and falsely characterize a patient's condition as requiring an emergency procedure.

B. Facts Relevant to Statute of Limitations.

The district court incorrectly found that Petitioner Lowman resigned his position on May 14, 1999. He notified Assistant United States Attorney Jennifer Aldrich of the claims that are the subject of the complaint on November 6, 2002. Ms. Aldrich is an "official of the United States charged with the responsibility to act under the circumstances" under the FCA. On September 2, 2005, Petitioner Lowman filed the complaint, which states claims commencing with his employment in 1997. He filed within the three-year period set forth in section 3731(b)(2). On July 20, 2006, the United States filed a notice of non-intervention in the suit.

On December 22, 2006, Respondents filed a motion to dismiss based on publicly disclosed information in violation of 31 U.S.C. § 3730(e)(4), and pursuant to the six-year statute of limitations under 31 U.S.C. § 3731(b). The district court converted the motions into motions for summary judgment. On April 24, 2007, the district court issued an order holding that Petitioner Lowman's claims were not subject to the public disclosure bar. However, it granted summary judgment on the grounds that the complaint was filed "more than six years after the alleged violations occurred and more than three years after he knew the relevant facts." (App. at 34a) In other words, the district court followed the interpretation of section 3731(b)(2) set forth in *United States ex rel. Hyatt v. Northrop Corp.*, 91 F.3d 1211 (9th Cir. 1996). In *Hyatt*, the court

determined that the three-year limitations period commences on the date the *qui tam* relator knew or reasonably should have known that a claim may exist. Based on this, the district court concluded that the complaint was barred by limitations and equitable tolling under section 3731(b)(2) did not apply because Petitioner Lowman resigned his position on May 14, 1999, and could not have personal knowledge of the fraud after that point in time. However, evidence in the case in the form of the Affidavit of Gina Leeds, Director of Medical Staff Services for Respondent Hilton Head Health Systems ("Leeds Affidavit"), established that Petitioner Lowman resigned effective May 1, 2000. The district court did not entertain oral argument to resolve this clear mistake of fact and ignored the Leeds Affidavit in the written order.

Despite having concluded that subject matter jurisdiction lies, Petitioner's appeal was denied in a one page order on November 18, 2008, on the grounds that the decision in *United States ex rel. Sanders v. North American Bus Indus. Inc.*, 546 F.3d 288 (4th Cir. 2008), was controlling on the issue of the application of the statute of limitations. A petition for rehearing en banc was also denied.

REASONS FOR GRANTING THE PETITION

The Court of Appeals for the Fourth Circuit erroneously concluded that the case of *United States ex rel. Sanders v. North American Bus Indus., Inc.*, 546 F.3d 288 (4th Cir. 2008), "is controlling on the issue of whether Lowman's action was time-barred under the False Claims Act's ("FCA") statute of limitations." (App. at 2a) In *Sanders*, the court of appeals held that "Section 3731(b)(2) extends the FCA's statute of limitations beyond six years only in cases in which the United States is a party." *Id.* at 293. This holding is at odds with the plain meaning of the statutory text and finds no support in the legislative history, congressional intent, nor this Court's analysis in *Graham County*. Most importantly, the flawed reasoning of the *Sanders* case directly collides with the sound analysis of federal courts which have concluded that *qui tam* relators were intended by Congress to benefit from the three-year equitable tolling provision of section 3731(b)(2), even in cases where the government has declined to intervene.

There is a compelling policy reason for this Court to grant a writ of certiorari. Doing so will ensure uniformity in the application of section 3731(b)(2) and avoid interpretations that fail to faithfully execute the intent of Congress to fully authorize the recovery of monies lost by the government due to fraud. Respectfully, this Court should also grant the writ because the appellate court and the district court failed to consider undisputed record evidence that Petitioner filed his

claims within the applicable six-year period allowed by 31 U.S.C. § 3731(b)(1).

I. The Appellate Court Decision Conflicts with the Statutory Text and Deepens Federal Court Divisions About the Application of the FCA's Statute of Limitations in *Qui Tam* Proceedings.

Section 3731(b) of the FCA contains two time periods to commence a civil action. In relevant part, the statute states:

> (b) A civil action under section 3730 may not be brought–
>
> > (1) more than 6 years after the date on which the violation of section 3729 is committed, or
> >
> > (2) more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances, but in no event more than 10 years after the date on which the violation is committed,
>
> whichever occurs last.

31 U.S.C. § 3731(b). Subparagraphs (1) and (2) do not distinguish between suits brought by the United

States or those filed by relators; that is, declined or intervened cases.

Notwithstanding the clear language of the statute, some courts have attempted to construe section 3731(b)(2)'s tolling language to apply only in cases in which the United States has intervened in the litigation after the suit is filed by a relator on behalf of the government.[1] A handful of other courts, however, have concluded that section 3731(b)(2) applies to relators, but that the three-year tolling provision under that section is measured by the relator's knowledge rather than when "the official of the United States charged with responsibility to act" learns of the false claims.[2]

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[1] *See, e.g., United States ex rel. Sanders v. North American Bus Indus., Inc.*, 546 F.3d 288, 296-97 (4th Cir. 2008); *United States ex rel. Sikkenga v. Regence BlueCross BlueShield of Utah*, 472 F.3d 702, 725 (10th Cir. 2006); *United States ex rel. Finney v. Nextwave Telecom, Inc.*, 337 B.R. 479, 486 (S.D.N.Y. 2006); *United States ex rel. Vosika v. Starkey Labs., Inc.*, No. Civ. 01-709, 2004 WL 2065127, at *2-3 (D. Minn. Sept. 8, 2004); *United States ex rel. Fisher v. Network Software Assocs., Inc.*, 180 F. Supp. 2d. 192, 194 (D.D.C. 2002); *United States ex rel. Thistlethwaite v. Dowty Woodville Polymer, Ltd.*, 6 F. Supp. 2d 263, 265 (S.D.N.Y. 1998); *United States ex rel. El Amin v. George Washington Univ.*, 26 F. Supp. 2d 162, 172 (D.D.C. 1998).

[2] *See, e.g., United States ex rel. Saaf v. Lehman Bros.*, 123 F.3d 1307 (9th Cir. 1997); *Hyatt v. Northrop Corp.*, 91 F.3d 1211 (9th Cir. 1996); *United States ex rel. Malloy v. Telephonics Corp.*, 68 Fed. App'x. 270 (3d Cir. 2003), *cert. denied*, 541 U.S. 974 (2004); *United States ex rel. Lowman v. Hilton Head Health Care Sys., L.P.*, 487 F. Supp. 2d 682 (D.S.C. 2007); *United States ex rel. Wilson v. Graham County Soil & Water Conservation Dist.*, No. Civ. 2:01CV19, 2002 WL 31455718 (W.D.N.C. May 30, 2002),

Petitioner respectfully submits that the proper construction of the provision is embodied in a third line of cases applying the same limitations period regardless of whether the action was brought by the United States or an individual *qui tam* plaintiff.[3]

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rev'd and vacated on other grounds 367 F.3d 245 (4th Cir. 2004); *United States ex rel. Downy v. Corning, Inc.*, 118 F. Supp. 2d 1160 (D.N.M. 2000); *United States ex rel. Bidani v. Lewis*, No. 97 C 6502, 1999 WL 163053 (N.D. Ill. Mar. 12, 1999).

[3] *See, e.g., United States ex rel. Gonzales v. Fresenius Medical Care North America*, No. EP-07-CV-247-PRM, 2008 WL 4277150 (W.D. Tex. Sept. 2, 2008) at *7-*8 (holding that the applicable statute of limitations period is three years from the date on which facts material to the instant action are or should be known to government officials); *United States ex rel. Pogue v. Diabetes Treatment Centers of America*, 474 F. Supp. 2d 75 (D.D.C. 2007); *United States ex rel. Lewis v. Walker*, No. 3:06-CV-16(CDL), 2007 WL 2713018 (M.D. Ga. Sept. 14, 2007) at *5-*6 (finding the reasoning of courts that reject the most restrictive interpretation of section 3731(b)(2) persuasive and thereby holding that the individual *qui tam* plaintiff action was not time barred); *United States ex rel. Salmeron v. Enterprise Recovery Sys., Inc.*, 464 F. Supp. 2d 766, 769-70 (N.D. Ill. 2006) (holding that the government's knowledge of the alleged scheme triggers the three-year time period and that the individual *qui tam* plaintiff's claim against third-parties was not time barred); *United States ex rel. Colunga v. Hercules Inc.*, No. 89-cv-954B, 1998 WL 310481 at *5 (D. Utah Mar. 6, 1998) ("The appropriate standard for determining when the three-year limitations period in section 3731(b)(2) began to run is when the Department of Justice received information as to the violation."), *overruled by Sikkenga v. Regence BlueCross BlueShield of Utah*, 472 F.3d 702 (10th Cir. 2006); *United States ex rel. Sanders v. E. Alabama Healthcare Auth.*, 953 F. Supp. 1404, 1413 (M.D. Ala. 1996) ("The Plaintiffs must also show that they acted within three years of learning of facts material to the false claim or within three years of the time in

The opinion in *United States ex rel. Pogue v. Diabetes Treatment Centers of America*, 474 F. Supp. 2d 75 (D.D.C. 2007) is instructive in this line of cases.

Pogue involved an FCA action against a chain of Diabetes Treatment Centers in an alleged kickback scheme. The defendant moved for judgment on the pleadings on statute of limitations grounds arguing that, in a case where the United States does not intervene, a relator is entitled to only the six-year statute of limitations described in section 3731(b)(1). *Pogue*, 474 F. Supp. 2d at 81. The court denied defendant's motion to dismiss in a well-reasoned and extensive memorandum opinion that addresses the application of section 3731(b)(2) to cases in which the United States declines to intervene.

After closely examining the different judicial interpretations of section 3731(b)(2), as well as the statutory language, legislative history, and the purpose of the FCA, the *Pogue* court addressed the proper construction of section 3731(b)(2). Simply stated, Congress intended relators' limitations period to be measured from the time the government learns of the false claims. *See id.* at 89. As observed by the *Pogue* court:

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which the government official responsible for this area knew or should have known that false claims were submitted."); *United States ex rel. Kreindler & Kreindler v. United Techs. Corp.*, 777 F. Supp. 195, 204-05 (N.D.N.Y. 1991) (time where government learned of the fraudulent design defect was the point in time where the three-year statute of limitations began for individual *qui tam* plaintiffs).

> There are good reasons to allow a relator the benefit of § 3731(b)(2) without imposing on him the burden of that subsection's knowledge requirement. As *Colunga* pointed out in some detail, a would-be relator, unlike the kind of government official identified by the statute, is under no obligation to act upon learning of facts material to an FCA claim. For many reasons-lack of sophistication, the complexity of many false claims schemes, fear of retribution by an employer, inability to find and retain adequate counsel, or even the simple fact that the would-be relator is *not* obligated to do so-the relator may fail to bring suit within three years of learning facts that would put a "reasonable relator"-whatever that is-on notice that she has a False Claims action on her hands. All of these are conceivable and perhaps excusable reasons for a relator to fail to bring a suit within three years, but they do not compel the conclusion that the government should not be able to benefit from a recovery once a suit is brought. In such cases, there is no reason to think that Congress would want to prevent recoveries in FCA cases, regardless of intervention.

Pogue, 474 F. Supp. 2d at 88 (internal citation omitted).

The analysis in *Pogue* is rooted in the unambiguous language of section 3731(b)(2). In interpreting a statute, "a court should always turn first to one, cardinal canon [of construction] before

all others": the plain meaning rule. *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253 (1992). A court may not disregard the plain language of a statute unless a literal application of the statutory language "would lead to absurd results . . . or would thwart the obvious purpose of the statute." *In re Trans Alaska Pipeline Rate Cases*, 436 U.S. 631, 643 (1978); *Nat'l Coalition for Students with Disabilities Educ. and Legal Defense Fund v. Allen*, 152 F.3d 283 (4th Cir. 1998).

In enacting section 3731(b), Congress made no distinction between suits brought by the United States and those brought by relators. Congress used a general heading of "False claims procedure" in introducing section 3731. 31 U.S.C. § 3731. The prefatory language to section 3731(b) references "[a] civil action under section 3730," which is an unqualified reference to **all actions** filed under section 3730, including civil actions filed by both the United States and a relator. *Compare* 31 U.S.C. § 3731(b), *with* 31 U.S.C. § 3730. Indeed, the prefatory language formerly stated "Every such suit" before being amended in 1982 with the language "[a] civil action under section 3730 of this title."

In context, section 3730 is entitled "Civil actions for false claims" and expressly includes the prosecution of false claims in violation of section 3729 by the Attorney General of the United States *and* a person who prosecutes a false claim "for the person and for the United States Government" which is "brought in the name of the Government." 31 U.S.C. § 3730. In order to reach the result that *qui*

tam plaintiffs are to be treated differently than the Attorney General, additional language not included by Congress must be read into the statute. Section 3731(b)(2) contains no language which excludes *qui tam* plaintiffs from the application of the three-year or ten-year provisions set forth in that section.

In *Pogue*, the court reasoned that "if (b)(2) is meant to apply only to the government, it would logically begin with a simple clause such as 'in cases where the United States brings the action or elects to intervene,' or the even simpler and equally elegant 'as to the United States.'" *Pogue*, 474 F. Supp. 2d at 84-85. The *Pogue* court further noted that:

> The statue is . . . unambiguous about subsection (b)(2)'s application to relators. . . . The statute does not purport to apply in any other way. [T]he statute says what it says, and it says that (b)(2)'s three-year statute of limitations applies across the board, measured by the government's knowledge.

Id. at 85. For these reasons, the statute's plain and unambiguous meaning is that *qui tam* relators are included within the scope of section 3731(b)(2)'s three-year equitable tolling provision. This includes instances where the United States declines to intervene in the litigation.

The appellate court's reliance in *Sanders* on the case of *Graham County Soil and Water Conservation Dist. v. United States ex rel. Guarantee*

Wilson, 545 U.S. 409 (2005), is unavailing. *Graham County* involved allegations of retaliatory discharge and not false claims. This Court held that section 3731(b)(1) was ambiguous, but only about whether the retaliation action was a civil action under section 3730. Indeed, the Court noted that "[a]nother reasonable reading is that it applies only to actions arising under §§ 3730(a) and (b), not to § 3730(h) retaliation actions." 545 U.S. at 415. In other words, *Graham County* assumed that the statute of limitations provisions in section 3731(b)(1) applied to actions by the Attorney General as well as actions by private persons, but perhaps not to retaliation actions. It only excluded retaliation claims under section 3730(h), not relator claims under section 3730(b). The Court also noted a "textual anomaly" wherein an ambiguity exists about whether an "action under section 3730" means all actions under section 3730, or only actions under section 3730(a) and (b). The Court noted no anomaly or ambiguity about the application of section 3731(b)(2).

This reasoning is entirely consistent with the fact that the United States is at all times the real party in interest in *qui tam* lawsuits and "stands in the place of the Government." *United States ex rel. Harrison v. Savannah River Co.*, 352 F.3d 908, 923 (4th Cir. 2003); *United States ex rel. Walker v. R&F Prop. of Lake County, Inc.*, 433 F.3d 1349, 1358 (11th Cir. 2005) (The "United States is the real party in interest in a *qui tam* action under the FCA even if it is not controlling the litigation."); *United States ex rel. Rodgers v. Arkansas*, 154 F.3d 865, 868 (8th Cir. 1998), *cert. dismissed* 527 U.S. 2018 (1999). That

the United States is always the real party in interest in *qui tam* litigation underscores the error in differentiating limitation periods between declined and intervened cases.

In *United States ex rel. Milam v. Univ. of Texas M.D. Anderson Cancer Center*, 961 F.2d 46 (4th Cir. 1992), the Court of Appeals for the Fourth Circuit held that "the United States is the real party in interest in a False Claims Act suit, even where it permits a *qui tam* relator to pursue the action on its behalf." 961 F.2d at 50. In support of this conclusion, the court correctly observed that *qui tam* relators sue "in the name of the Government." 961 F.2d at 48 (citing 31 U.S.C. § 3730(b)(1)). Several factors were considered by the court in reaching its decision. If the government decides to intervene, it is entitled to the majority of the recovery, if any. 961 F.2d at 48. In cases where the government prosecutes the action, the relator gets 15-25% of the recovery; if the government does not intervene, the relator gets 25-30%. 961 F.2d at 49 (citing 31 U.S.C. § 3730(d)(1)-(2)). The case may not be settled or voluntarily dismissed without the government's consent, even where the government allows the relator to pursue the action. 961 F.2d at 49. The government may also intervene at any point in the litigation "upon a showing of good cause." 961 F.2d at 49 (citing 31 U.S.C. § 3730(c)(3)). These factors establish that, although the *qui tam* lawsuit is prosecuted on behalf of the government, ultimate control of the litigation firmly remains with the United States.

Moreover, the legislative history of section 3730 compels the conclusion that the statute applies with equal force to both relators and the United States. Section 3731(b)(2) was not added to the FCA until 1986. The legislative history regarding the 1986 amendments to the statute of limitations is limited and generally refers to the "government" benefiting from the extended statute of limitations. However, the Senate also used the term "government" to refer to statutory provisions that apply to relators. *See* S. REP. NO. 99-345, at 15 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5280. The Senate Report further notes that the "statute of limitations does not begin to run until the material facts are known *by an official within the Department of Justice with the authority to act in the circumstances*." S. REP. NO. 99-345, at 30 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5280 (emphasis added). Likewise, the House Report also makes references to the "government" when discussing the statute of limitations amendment. H.R. REP. NO. 99-660, at 25 (1986).

The Senate and House Reports use the words "government" and "United States" synonymously. The Reports depart from this practice and use "the very specific 'official within the Department of Justice with the authority to act in the circumstances' and 'official of the United States with responsibility to act' when describing the person whose knowledge matters" for purposes of the tolling provision. *United States ex rel. Pogue v. Diabetes Treatment Centers of America*, 474 F. Supp. 2d 75, 87 (D.D.C. 2007).

Thus, nothing in the legislative history of section 3731(b)(2) supports the conclusion that, in *qui tam* litigation where a relator prosecutes claims on behalf of the government, Congress intended different limitations periods to apply than in intervened cases. Given the plain language of the statute, and in the absence of any inconsistent legislative history, it is an unsupportable construction of the FCA that a relator's prosecution of a false claim is limited to only six years whereas the United States can recover for up to ten years if it intervenes in the action to prosecute the same fraud allegations.

Differentiating between cases in which the United States does and does not intervene conflicts with the policies underlying the remedial nature of the FCA. Instructive in this regard is the decision of the Court of Appeals for the Eighth Circuit in *United States ex rel. Rodgers v. Arkansas*:

> The focus of the Act is on exposing fraud on the government and recovering resulting government losses. The *qui tam* provisions facilitate this process, but they do not alter the underlying character of the action as one for the aggrieved party as defined by the statute. *See Marvin v. Trout*, 199 U.S. 212, 224-26 (1905). The *qui tam* mechanism exists to motivate individuals to further the interest of the government in remaining free from frauds perpetrated against it. Confronting the same question before us, the Fourth Circuit stated, and we agree, that "the structure of

> the *qui tam* procedure, the extensive benefit flowing to the government from any recovery, and the extensive power the government has to control the litigation weigh heavily against [the defendant]." *United States ex rel. Milam v. University of Texas M.D. Anderson Cancer Ctr.*, 961 F.2d 46, 49 (4th Cir. 1992).

United State ex rel. Rodgers v. State of Arkansas, 154 F.3d 865, 868 (8th Cir. 1998).

Courts that restrict section 3731(b)(2)'s three-year tolling provision to intervened cases ignore the plain meaning, legislative history, and congressional intent of the statute and, instead, focus on perceived difficulties in applying it to actions brought by relators. The argument, for example, that utilizing a limitations period based on the knowledge of a non-party, *i.e.*, the official of the United States, would produce a "bizarre scenario" is contrary to the legislative scheme which installs the United States as the real party in interest. Indeed, the FCA mandates that relators give notice to the United States as a precursor to filing suit, thereby imparting knowledge of the fraud to the government. It cannot, therefore, be said that the commencement of the knowledge of the United States in either declined or intervened cases tends to create bizarre results unanticipated by the statute.

The role of the judiciary is to interpret and apply the law as it exists.[4] *Sanders* and the decision

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[4] Courts have an "obligation to avoid judicial legislation." *McMellon v. United States*, 387 F.3d 329, 361 (4th Cir. 2004)

below deviate from this role by effectively amending the limitations period enacted by Congress to distinguish between *qui tam* relators and the United States, inserting a shorter statute of limitations for the former and an extended period for the latter. This is not the proper function of the court where the statute is unambiguous on its face.

(quoting *United States v. Locke*, 471 U.S. 84, 96 (1985)). When "nothing in the legislative history remotely suggests a congressional intent contrary to Congress' chosen words . . . any further steps take the courts out of the realm of interpretation and places them in the domain of legislation." *McMellon*, 387 F.3d at 361 (quoting *Northwest Airlines, Inc. v. Transp. Workers Union of Am.*, 451 U.S. 77, 95 (1981)); *see also United States v. Shirah*, 253 F.2d 798, 800 (4th Cir. 1958) (courts are not free to rewrite legislative enactments to give effect to the judges' ideas of policy and fitness or the desirability of symmetry in statutes); *United States v. Childress*, 104 F.3d 47, 52 (4th Cir. 1996) (just as the court may not rewrite a statute due to a perceived congressional drafting error, the court most certainly may not ignore the language contained in the statute); *Clayton v. Warlick*, 232 F.2d 699, 703 (4th Cir. 1956) (the amendment of a statute is a matter for Congress, not for the courts); *United States v. Murphy*, 35 F.3d 143, 145 (4th Cir. 1994) (courts are not free to read into the language what is not there, but rather must apply the statute as written); *Brotherhood v. Atlantic Coast Line R. Co.*, 253 F.2d 753, 758 (4th Cir. 1958) (the courts are without power to amend the statute or disregard its plain provisions).

II. The Lower Courts Failed to Account for Undisputed Record Evidence That Petitioner's Claims Are Timely Under 31 U.S.C. § 3731(b)(1).

The district court found that Petitioner Lowman resigned his position on May 14, 1999, and brought suit pursuant to the FCA on September 1, 2005. Therefore, the district court concluded that he did not bring his suit within the six-year statute provided in section 3731(b)(1). However, evidence before the district court in the form of the Affidavit of Gina Leeds, Director of Medical Staff Services for Hilton Head Health Systems, establishes that his resignation was one year later than the court concluded. As the Leeds Affidavit establishes, the earlier May 14, 1999, date was when Petitioner resigned from Tenet Physician Services, not when he resigned from the hospital. As noted, the district court did not entertain oral argument to resolve this factual issue and ignored the Leeds Affidavit in the written order.

Based on Respondent's affidavit, the filing of the FCA action on September 1, 2005, was within the six year provision of 31 U.S.C. § 3731(b)(1). The district court incorrectly relied on an earlier May 14, 1999, date in the record. Because of its reliance on this earlier date, the district court incorrectly concluded that Dr. Lowman would have no knowledge of continuing fraud after May 14, 1999, which is reversible error. The Respondent's affidavit establishes the timeliness of the complaint even

under the six-year limitations period. The appellate court did not address or reconcile this fact.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully Submitted,

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April 17, 2009

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 07-1485 (L)
(9:05-cv-02533-PMD)

UNITED STATES OF AMERICA, EX REL. BRUCE G. LOWMAN,
PLAINTIFF – APPELLANT

v.

HILTON HEAD HEALTH SYSTEM LP; TENET HEALTHCARE CORPORATION, FORMERLY KNOWN AS NATIONAL MEDICAL ENTERPRISES, FORMERLY KNOWN AS AMERICAN MEDICAL INTERNATIONAL INCORPORATED; TENET PHYSICIAN SERVICES-HILTON HEAD INCORPORATED; HILTON HEAD MEDICAL GROUP CARDIOLOGY LLC; JAMES DOUGLAS JOHNSTON, INDIVIDUALLY AND AS A MEMBER OF THE MEDICAL STAFF,
DEFENDANTS – APPELLEES

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA
USDC No. 9:05-cv-2533-PMD

[Filed Nov. 18, 2008]

TAXPAYERS AGAINST FRAUD EDUCATION FUND,
AMICUS SUPPORTING APPELLANT

ORDER

We are satisfied, as was the district court, that subject matter jurisdiction lies. Our decision in No. 07-1773, *United States ex rel. Sanders v. North American Bus Industries, Inc.*, is controlling on the issue of whether Lowman's action was time-barred under the False Claims Act's ("FCA") statute of limitations. The district court held that Lowman's claims were untimely under the six-year limitations period in U.S.C. § 3731(b)(1). JA 72. The court noted that Lowman had asserted that FCA violations occurred within the six-year period, but the court held that Lowman had not pleaded those violations adequately because he could not have had personal knowledge of violations that occurred after he left the hospital. JA 72 n.13. On appeal, Lowman does not challenge that conclusion. Nowhere does Lowman argue that he satisfied Section 3731(b)(1) by filing his action within six years of alleged FCA violations on the part of the hospital. Lowman contends only that we should apply the limitations period in Section 3731(b)(2) to his claims – the very argument that we rejected in *Sanders*. The judgment of the district court is therefore affirmed.

Entered for a panel of Judge Wilkinson, Judge Michael, and Judge Traxler.

For the Court
/s/ Patricia S. Connor, Clerk

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
BEAUFORT DIVISION

C.A. No. 9:05-02533-PMD

UNITED STATES OF AMERICA, EX REL.
BRUCE G. LOWMAN, PLAINTIFF

v.

HILTON HEAD HEALTH SYSTEM LP; TENET HEALTHCARE CORPORATION, FORMERLY KNOWN AS NATIONAL MEDICAL ENTERPRISES, FORMERLY KNOWN AS AMERICAN MEDICAL INTERNATIONAL INCORPORATED; TENET PHYSICIAN SERVICES-HILTON HEAD INCORPORATED; HILTON HEAD MEDICAL GROUP CARDIOLOGY LLC; JAMES DOUGLAS JOHNSTON, INDIVIDUALLY AND AS A MEMBER OF THE MEDICAL STAFF, DEFENDANTS

ORDER

This matter is before the court upon two Motions to Dismiss, one filed by Defendants Tenet Physician Services-Hilton Head, Inc.; Hilton Head Medical Group-Cardiology, L.L.C.; Hilton Head Health System L.P.; and Tenet Healthcare Corporation (collectively "Hospital Defendants") and another filed by Defendant James Douglas Johnston ("Johnston"). For the reasons set forth herein, the court converts these motions to Motions for Summary Judgment and grants Defendants'

motions.

BACKGROUND

Relator Bruce G. Lowman, M.D. ("Lowman" or "Plaintiff") filed a complaint against Hilton Head Medical Center and Clinics ("HHMCC") and other corporate entities under the *qui tam* provisions of the federal False Claims Act ("FCA") on September 1, 2005. *See* 31 U.S.C. § 3729 *et seq*. Dr. Lowman was employed by Defendant HHMCC as a vascular surgeon beginning on or about March 10, 1997, and he is a former Director of the hospital's Vascular Laboratory. (Compl.¶ 9.) Lowman alleges that several days after he began working for HHMCC, he was summoned to a private meeting with HHMCC's President and CEO Dennis Bruns, in which Bruns told Lowman that Dr. James Johnston[1] "regularly performed medically unnecessary therapeutic cardiac catheterizations (including angioplasties and stents) on patients in non-emergent circumstances even though Defendant HHMCC did not have open heart surgery facilities." (Compl. ¶¶ 58-59.)[2] According to Plaintiff,

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[1] Dr. Johnston was employed, beginning in 1993, by HHMCC, and Johnston served as Director of HHMCC's Catheterization Laboratory during all relevant times. (Compl. ¶ 20.)

[2] The South Carolina Department of Health and Environmental Control ("DHEC") administers the South Carolina State Certification of Need and Health Facility Licensure Act. *See* S.C. CODE ANN. § 44-7-110 *et seq*. The Act requires health care facilities to obtain a Certificate of Need before undertaking, *inter alia*, the construction of a new health care facility or offering certain health services which the facility has not offered in the preceding twelve months. *See* S.C. CODE ANN. § 44-7-160. Both parties agree that in 1995, the State Health Plan promulgated by DHEC indicated that

Bruns "characterized the problem as 'very delicate' because Defendant Johnston and the Catheterization Laboratory generated a substantial amount of revenue for Defendants." (Compl. ¶ 60.)

Lowman further alleges that Bruns "said he wanted Dr. Lowman to be his 'eyes and ears' in the Catheterization Laboratory regarding Defendant Johnston's procedures and report what Dr. Lowman observed." (Compl. ¶66.) Lowman states he reported to Bruns and Dr. Kunze, HHMCC' s Medical Director, regarding the medically unnecessary procedures of Defendant Johnston and the Catheterization Laboratory, including Dr. Johnston's partner, Dr. Paul Slota. (Compl. ¶67.) Plaintiff's complaint further alleges that hospital administrators asked him to review medical records of patients treated by Johnston and Slota and that he conducted such a review with several other physicians, including Dr. Kaup, Dr. Lens, Dr. Platt, Dr. Trotter, and Dr. Hart. (Compl. ¶ 68.) The Complaint states,

> Hundreds of medical records were examined by Dr. Lowman and other physicians as part of the review. As many as two-thirds of the records indicated that therapeutic cardiac catheterizations or peripheral catheterizations were performed by Defendant Johnston and/or the Catheterization Laboratory in circumstances

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cardiac catheterization labs could perform diagnostic procedures but could not perform therapeutic cardiac catheterizations unless the hospital also had an open-heart surgery capability. HHRMC did not receive its Certificate of Need for open-heart surgery until July 2002. (Compl. ¶73; Hospital Defs.'s Mem. in Supp. at 4-5.)

> which were medically unnecessary and/or non-emergent.

(Compl. ¶ 69.) Lowman alleges many of the Defendants' agents and employees knew of the unnecessary procedures being performed, including W. Randolph Smith, a senior officer of Defendant Tenet Healthcare Corporation; Kathy Meyers, former Nurse Director of the Catheterization Laboratory; Andrea Wozniak, HHMCC's Chief Operating Officer; and David O'Conner, HHMCC's Chief Financial Officer. (Compl. ¶¶ 70-71.)

Dr. Lowman also alleges that while at HHMCC, the hospital developed an extended care and rehabilitation program, including a cardiopulmonary program. According to Lowman, hospital administrators pressured him and other medical staff to fill the additional beds regardless of whether patients required rehabilitation services. (Compl. ¶ 87.) When he questioned this procedure, hospital administrators told Lowman "to chart his patients as needing physical therapy or rehabilitation so that Defendant HHMCC would be reimbursed for the services." (Compl. ¶ 87.) Lowman alleges "[u]pon information and belief that Defendants billed Medicare for extended care and rehabilitation services for patients without a medical necessity. (Compl. ¶ 88.)

In addition, Lowman alleges Defendants "routinely engaged in fraudulent coding by misrepresenting the level of service provided and/or misrepresenting the type of service provided." (Compl.¶ 89.) According to Plaintiff, HHMCC required its

medical staff to chart all of a patient's medical conditions, even if the patient was not treated for that condition, and as a result, Medicare reimbursed HHMCC for treatment the hospital did not provide. (Compl.¶ 91.) Defendant HHMCC then concealed this wrongdoing by falsifying or knowingly failing to disclose these procedures in the Joint Annual Report of Hospital ("JARS") forms. (Compl.¶ 93.) Additionally arguing HHMCC did not meet the definition of a "hospital," Plaintiff alleges Defendants "were not authorized to bill Medicare for the performance of services or procedures that violated the statutory and regulatory prerequisites of the Federal healthcare program." (Compl.¶ 102.)

Plaintiff's complaint lists five causes of action, all brought pursuant to the False Claims Act: (1) False Claims Act: Presentation of False Claims, (2) False Claims Act: Making or Using False Record or Statement to Cause False Claim to be Paid, (3) False Claims Act: Conspiring to Submit False Claims, (4) False Claims Act: Making or Using a False Record or Statement to Avoid an Obligation to Refund, and (5) False Claims Act: Improper Coding. The Hospital Defendants filed a Motion to Dismiss on December 22, 2006, and Defendant Johnston filed a Motion to Dismiss on January 12, 2007. Defendants filed these motions pursuant to Federal Rules of Civil Procedure 9(b), 12(b)(1), and 12(b)(6).

STANDARD OF REVIEW

A. Rule 12(b)(6)

A Rule 12(b)(6) motion should be granted only if, after accepting all well-pleaded allegations in the complaint as true, it appears certain that the plaintiff cannot prove any set of facts in support of his claims that entitles him to relief. *See Edwards v. City of Goldsboro,* 178 F.3d 231, 244 (4th Cir.1999). The complaint should not be dismissed unless it is certain that the plaintiff is not entitled to relief under any legal theory that plausibly could be suggested by the facts alleged. *See Mylan Labs., Inc. v. Matkari,* 7 F.3d 1130, 1134 (4th Cir.1993). Further, "[u]nder the liberal rules of federal pleading, a complaint should survive a motion to dismiss if it sets out facts sufficient for the court to *infer* that all the required elements of the cause of action are present." *Wolman v. Tose,* 467 F.2d 29, 33 n. 5 (4th Cir.1972).

Under this rule, "when matters outside the pleadings are submitted with a motion to dismiss for failure to state a claim upon which relief can be granted ..., the motion shall be treated as one for summary judgment...." *Gay v. Wall,* 761 F.2d 175, 177 (4th Cir.1985) (internal quotation marks omitted). All parties must be given a "reasonable opportunity to present all material made pertinent to such a motion by Rule 56." Fed.R.Civ.P. 12(b). The Fourth Circuit has stated that a "reasonable opportunity" means "some indication by the court to all parties that it is treating the 12(b)(6) motion as a

motion for summary judgment, with the consequent right in the opposing party to file counter affidavits or to pursue reasonable discovery." *Johnson v. RAC Corp.*, 491 F.2d 510, 513 (4th Cir.1974) (internal quotation marks and citations omitted). "When a party is aware that material outside the pleadings is before the court, the party is on notice that a Rule 12(b)(6) motion may be treated as a motion for summary judgment." *Gay*, 761 F.2d at 177.

B. Rule 12(b)(1)

In general, when evaluating a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1) on the grounds that the complaint fails to state facts upon which jurisdiction can be founded, "all the facts alleged in the complaint are assumed to be true and the plaintiff, in effect, is afforded the same procedural protection as he would receive under a Rule 12(b)(6) consideration." *Adams v. Bain*, 697 F.2d 1213, 1219 (4th Cir.1982). The plaintiff has the burden of proving jurisdiction, and the court may go beyond the face of the complaint and consider evidence without converting the motion into one for summary judgment. *Richmond, Fredericksburg & Potomac R.R. Co. v. United States*, 945 F.2d 765, 768 (4th Cir.1991). However, if the evidence is disputed, the court may weigh and determine the facts. *See Thigpen v. United States*, 800 F.2d 393, 396 (4th Cir.1986), *overruled on other grounds, Sheridan v. United States*, 487 U.S. 392, 108 S.Ct. 2449, 101 L.Ed.2d 352 (1988). "When jurisdictional facts are disputed, no presumption of truthfulness attaches to the plaintiff's allegations." *U.S. ex rel. Ackley v. Int'l*

Bus. Machs. Corp., 76 F.Supp.2d 654, 659 (D.Md.1999) (citing *Commodity Trend Serv., Inc. v. Commodity Futures Trading Commission*, 149 F.3d 679, 685 (7th Cir.1998)).

C. Rule 56

To grant a motion for summary judgment, the court must find that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). The judge is not to weigh the evidence but rather must determine if there is a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). All evidence should be viewed in the light most favorable to the nonmoving party. *Perini Corp. v. Perini Constr., Inc.*, 915 F.2d 121, 123-24 (4th Cir.1990). "[W]here the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, disposition by summary judgment is appropriate." *Teamsters Joint Council No. 83 v. Centra, Inc.*, 947 F.2d 115, 119 (4th Cir.1991). "[T]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). The "obligation of the nonmoving party 'is particularly strong when the nonmoving party bears the burden of proof.' " *Hughes v. Bedsole*, 48 F.3d 1376, 1381

(4th Cir.1995) (quoting *Pachaly v. City of Lynchburg*, 897 F.2d 723, 725 (4th Cir.1990)). Summary judgment is not "a disfavored procedural shortcut," but an important mechanism for weeding out "claims and defenses [that] have no factual basis." *Celotex*, 477 U.S. at 327.

ANALYSIS

Congress originally passed the False Claims Act during the Civil War "in response to overcharges and other abuses by defense contractors," intending that the Act "and its *qui tam* action would help the government uncover fraud and abuse by unleashing a 'posse of *ad hoc* deputies to uncover and prosecute frauds against the government.' " *Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776, 784 (4th Cir.1999) (quoting *U.S. ex rel. Milam v. Univ. of Tex. M.D. Anderson Cancer Ctr.*, 961 F.2d 46, 49 (4th Cir.1992)). In relevant part, the Act provides,

> (a) Any person who-
>
> > (1) knowingly presents, or causes to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false and fraudulent claim for payment or approval;
> >
> > (2) knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the

> Government;
>
> (3) conspires to defraud the Government by getting a false or fraudulent claim allowed or paid; [or]
>
> ...
>
> (7) knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government,
>
> is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, plus 3 times the amount of damages which the Government sustains because of the act of that person....

31 U.S.C. § 3729(a). The Act defines "knowingly" to mean that a person "(1) has actual knowledge of the information; (2) acts in deliberate ignorance of the truth or falsity of the information; or (3) acts in reckless disregard of the truth or falsity of the information, and no proof of specific intent to defraud is required." *Id.* § 3729(b).

A. Motion to Dismiss Pursuant to Rule 12(b)(1)

Defendants first move to dismiss Plaintiff's claims pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure, asserting Plaintiff has failed to

plead facts that demonstrate the court has subject matter jurisdiction to hear his claims. (Hospital Defs.'s Mot. at 1-2.) More specifically, Defendants argue the court should grant their Motion to Dismiss because Plaintiff's complaint is based on publicly-disclosed information and Plaintiff has failed to demonstrate he is an " 'original source' having direct and independent knowledge of the information in his Complaint and that he provided the information to the government before filing his action." (Hospital Defs.'s Mem. in Supp. at 14-15.)

With 31 U.S.C. § 3730(e)(4), Congress sought to strike a balance between encouraging private enforcement suits and preventing "'parasitic' *qui tam* actions in which relators, rather than bringing to light independently-discovered information of fraud, simply feed off of previous disclosures of government fraud." *U.S. ex rel. Siller v. Becton Dickinson & Co.*, 21 F.3d 1339, 1347 (4th Cir.1994). Section 3730(e)(4) in relevant part provides,

> (A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

> (B) For purposes of this paragraph, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.

31 U.S.C. § 3730(e)(4). In the Fourth Circuit, the phrase "based upon" means "derived from." *Siller*, 21 F.3d at 1348. Thus, even if a prior suit "includes allegations that happen to be similar (even identical) to those already publicly disclosed," if the relator's action is not "actually derived from those public disclosures," then the suit is not based upon the public disclosure. *Id.*

Section 3730(e)(4) thus requires this court to answer three questions:

> (1) Have allegations made by the relator been "publicly disclosed" before the qui tam suit was brought? (2) If so, is the qui tam suit "based upon" the public disclosure? and (3) If so, was the relator an "original source" of the information on which the allegations were based? Jurisdiction exists only if the answer to one of the first two questions is "no" or the answer to the third question is "yes."

Minn. Ass'n of Nurse Anesthetists v. Allina Health Sys. Corp., 276 F.3d 1032, 1042 (8th Cir.2002); *see also U.S. ex rel. Reagan v. E. Tex. Med. Ctr. Reg'l Healthcare Sys.*, 274 F.Supp.2d 824, 841

(S.D.Tex.2003).

1. Whether Allegations Made by Relator Were "Publicly Disclosed"

Defendants first argue this court does not have jurisdiction because the allegations made by Plaintiff were publicly disclosed before he brought the qui tam suit.[3] According to Defendants, not only does Plaintiff" derive[]" his allegations from publicly-disclosed information, but he expressly incorporates this information into the text of his allegations." (Hospital Defs.'s Mem. in Supp. at 14 (citation omitted).) Defendants argue Plaintiff's allegations are based on information disclosed in an administrative hearing before DHEC and information disclosed in the news media. (Hospital Defs.'s Mem. in Support at 15-16.)[4]

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[3] As previously noted, in considering a motion pursuant to Rule 12(b)(l) of the Federal Rules of Civil Procedure, the court may go beyond the face of the complaint and consider evidence without converting the motion into one for summary judgment. *Richmond*, 945 F.2d at 768.

[4] According to Defendants, a Consent Order qualifies as an administrative hearing under § 3730(e)(4). The Consent Order arises out of HHMCC's performance of therapeutic cardiac catheterizations when the hospital did not provide open-heart surgery; HHMCC voluntarily reported its non-compliance with the State Health Plan to DHEC on July 26,2000. (*See* Hospital Defs.'s Mem. in Supp. Ex. 2 at 2.) The Consent Order states,

> 3. One of the standards for cardiac catheterization laboratories as outlined in the *1994 South Carolina Health Plan* and subsequent health plans, states that diagnostic cardiac catheterization

On the other hand Plaintiff argues the Consent Order is not an administrative hearing under the FCA or state law. (Pl's Mem. in Opp'n at 17.) Plaintiff also argues the coverage in the news media does not bar his claims because he provided the information on Defendants' malfeasance years before any news coverage and that his allegations therefore "cannot be 'actually derived' from media." (Pl's Mem. in Opp'n at 19.)

> laboratories shall not be allowed to perform therapeutic procedures. Therapeutic cardiac catheterizations can only be performed in hospitals that provide open-heart surgery.
>
> 4. On July 26, 2000, Mr. Dennis Bruns, Hilton Head President and CEO, informed the Department that therapeutic cardiac catheterizations had been performed in non-emergent situations since 1997. These procedures were not reported in the Joint Annual Reports submitted to [DHEC] each year.
>
> 5. Based on a report submitted to ... [DHEC] dated December 11, 2000, therapeutic cardiac catheterizations were performed in 436 cases from the periodbeginning January 1, 1997 through March 31, 2000.
>
> 6. Of these therapeutic catheterizations, Hilton Head has also reported to ...[DHEC] that 242 procedures were performed on patients in non-emergent circumstances during the period at issue.

(Hospital Defs.'s Mem. in Supp. Ex. 2 at 2.) Pursuant to this order, HHMCC paid DHEC a civil penalty in the amount of $24,200, which represented a $100 fine for each of the 242 non-emergent therapeutic catheterizations. (Hospital Defs.'s Mem. in Supp. Ex. 2 at 3-4.)

While both parties vigorously argue over whether the Consent Order is an administrative hearing, the court need not determine whether the actual order is a public disclosure because news media coverage constitutes public disclosure, and the news media extensively covered the terms of the Consent Order. *See* 31 U.S.C. § 3730(e)(4)(A); *see also Grayson v. Advanced Mgmt. Tech., Inc.*, 221 F.3d 580, 582 (4th Cir.2000) ("To be publicly disclosed, the information must be conveyed in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media."(internal quotation marks omitted)). An article in the *Hilton Head Island Packet* dated November 14, 2004 disclosed the following:

> For more than three years, heart patients at Hilton Head Regional Medical Center underwent 242 invasive cardiac procedures strictly forbidden by state health rules, records show.
>
> During that period, from Jan[uary] 1, 1997 to March 31, 2000, the hospital also sent state health authorities reports that obscured the fact that the procedures had been done.
>
> The procedures were "non-emergent therapeutic cardiac catheterizations"-called "caths" in medical shorthand. The hospital admitted to the state Department of Health and Environmental Control in July 2000 that

the caths had been done and misidentified on the reports, according to records. DHEC, which oversees health care in South Carolina, accepted the hospital's word that it hadn't intentionally violated any rules and fined it $24,200, according to a February 2001 legal settlement.

. . .

The unauthorized therapeutic caths were performed in the hospital's cardiac cath lab, whose director at the time was Hilton Head Island cardiologist James D. Johnston, according to the hospital. Johnston was one of the cath lab's main users while he was director, from 1996 until August 2001, according to records and interviews....

Johnston and his lawyers have declined repeated requests for interviews. The doctor has been barred from practicing in the state until he is treated for an alcohol abuse problem. He also faces federal charges of posing as an American citizen although he was born in Canada. Johnston pleaded not guilty to the charge on Oct[ober] 28.

Over the past seven months, The Island Packet has examined hundreds of pages of documents and interviewed scores of people.... The Packet's review showed:

. . .

- In addition to the 242 therapeutic caths resulting in fines, the hospital did another 194 during the 39-month period. DHEC didn't levy fines for these because the hospital said they were necessitated by emergencies. DHEC's rules contained no exception allowing therapeutic caths in emergencies....

- After the $24,200 fine, the hospital continued doing therapeutic caths for two and a half years, until its open-heart program began. These caths also were necessitated by emergencies, according to the hospital.

- The hospital told DHEC that the unauthorized caths were "discovered" three years after they began, but it's not clear how they were overlooked before that.

- The hospital repeatedly submitted inconsistent facts and figures about its cardiac procedures to DHEC, which rarely questioned the data.

- Ambulances from the Town of Hilton Head Island were routinely summoned to the hospital by the cardiac cath lab staff and parked outside the hospital, waiting on standby while therapeutic caths were done....

(Hospital Defs.'s Mem. in Supp. Ex. 7.)[5]

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[5] *See* Fitz McAden & Jessica Flathmann, *Heart Problems: Hilton Head's Hospital Admitted That It Performed Cardiac Procedures*

The November 14 article also refers to the Primary Angioplasty in Acute Myocardial Infarction, No Surgery-on-Site Sudy, also known as the "PAMI No SOS" trials. According to the article, this study addresses the issue of of whether heart attack victims are better off getting therapeutic catheterizations immediately, even if the hospital does not have the capability to perform open-heart surgery, or whether they should instead be transferred to a hospital with an open-heart surgery unit for the procedure. An article on the study was published in a cardiology journal; the journal article stated that states prohibiting therapeutic catheterizations in hospitals without open-heart surgery units were prohibited from participating in the PAMI No SOS trials. As the November 14 article reports, however, HHMCC participated anyway, and of the nineteen participating hospitals, HHMCC enrolled the most patients. (Hospital Defs.'s Mem. in Supp. Ex. 7.)

Lastly, the November 14 article states, "Reports sent by the hospital to DHEC each year also raise questions about how hospital officials could have been unaware of the therapeutic caths." (Hospital Defs.'s Mem. in Supp. Ex. 7.) On the reports, hospitals are asked to indicate the number of diagnostic catheterizations, therapeutic catheterizations, and "all other" procedures, which is "a catch-all for minor, non-invasive procedures." (Hospital Defs.'s Mem. in Supp. Ex. 7.) The November 14 article describes how the hospital did not properly report these procedures:

Without Required Safeguards, HILTON HEAD ISLAND PACKET, NOV. 14, 2004.

> In 1997, the hospital skipped over the lines on the form where the number of therapeutic caths should have been entered, and instead lumped that year's 221 therapeutic caths into the "all other" category. Similarly, in the 1998 report, the hospital listed only two of its 267 therapeutic caths properly, putting the other 265 into the "all other" category. The next year, too, the hospital reported only four of 356 therapeutic caths accurately, putting the rest in "all other."
>
> The hospital sent DHEC corrected reports on Sept[ember] 6, 2000, two months after it disclosed the unauthorized caths.

(Hospital Defs.'s Mem. in Supp. Ex. 7.)

As this article from the *Hilton Head Island Packet* was published in November 2004, and Plaintiff did not file suit until September 2005, the court finds the first question required pursuant to § 3730(e)(4), whether allegations made by the relator have been publicly disclosed before the qui tam suit was brought, must be answered in the affirmative.

2. Whether the Qui Tam Suit is Based upon the Public Disclosure

The next question in the § 3730(e)(4) jurisdictional inquiry is whether the qui tam suit is based upon the public disclosure. As previously noted, in the Fourth Circuit,

> [A] relator's action is "based upon" a public disclosure of allegations only where the relator has actually derived from that disclosure the allegations upon which his *qui tam* action is based. Such an understanding of the term "based upon," apart from giving effect to the language chosen by Congress, is fully consistent with section 3730(e)(4)'s indisputed objective of preventing "parasitic" actions, for it is self-evident that a suit that includes allegations that happen to be similar (even identical) to those already publicly disclosed, but were not actually derived from those public disclosures, simply is not, in any sense, parasitic.

Siller, 21 F.3d at 1348 (citation omitted).

Defendants argue Plaintiffs allegations are based on information disclosed in the news media. (Hospital Defs.'s Mem. in Supp. at 16.) Defendants state, "Relator's Complaint that he filed months after these articles[6] were published simply lifts wholesale much of the information that is set forth in those stories as the basis for his FCA claims." (Hospital Defs.'s Mem. in Supp. at 17.) Defendant also asserts Plaintiff "expressly incorporates the PAMI Study from the *Journal of the American College of Cardiology* in his Complaint as a basis for his claims that [therapeutic

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[6] The *Hilton Head Island Packet* published several other articles potentially relevant to the case *sub judice*. The court finds it unnecessary to describe the contents of the other articles, however, as the additional articles do not affect the court's analysis.

cardiac catheterizations] were being performed by Johnston at HH[M]CC and that the hospital knew that Dr. Johnston was not in compliance with the applicable regulations." (Hospital Defs.'s Mem. in Supp. at 17-18.) Plaintiff argues his suit is not based on public disclosures; he states that he contacted the United States Attorney regarding the allegations in his Complaint in early November 2002 and that his allegations thus cannot be actually derived from the media. (*See* Compl. ¶ 5; Pl's Decl. ¶ 4.) Plaintiff further states,

> [E]ven a cursory comparison [of the newspaper articles to his Complaint] demonstrates that the false claims are independent of the articles:
>
> - Medically unnecessary therapeutic cardiac catheterizations were not disclosed in the articles, but are alleged in the Complaint.
> - Medically unnecessary peripheral catheterizations were not disclosed in the articles, but are alleged in the Complaint.
> - Medically unnecessary rehabilitation services were not disclosed, but are alleged in the Complaint.
> - Medically unnecessary tests related to the peripheral and cardiac cathetherizations were not disclosed, but are alleged in the Complaint.
> - False billing was not disclosed, but is alleged in the Complaint.

(Pl.'s Mem. in Opp'n at 20.) In Reply, Defendants state that the JARS HHMCC filed and the PAMI No

SOS Study are public sources and that these sources are "integral" to Plaintiff's claims. (Hospital Defs.'s Reply at 3.) Furthermore, Defendants argue that while Plaintiff complains of medically unnecessary catheterizations,[7] the basis for this allegation is that the catheterizations were performed in non-emergent circumstances and without on-site open-heart surgery capability, a fact which was disclosed in the news media. (Hospital Defs.'s Reply at 4.)

Plaintiff does allege facts in his Complaint that have not been publicly disclosed, and these allegations thus cannot be based on the public disclosure. However, many of the facts Plaintiff alleges in his 2005 Complaint appeared in the *Hilton Head Island Packet* in 2004. In *Siller,* the Fourth Circuit vacated the part of the district court's order that dismissed Siller's complaint as "based upon" the allegations of a previous lawsuit. *See Siller,* 21 F.3d at 1355. The court said,

> It is not clear to us that the district court found that Siller actually derived the allegations in his *qui tam* action from the [previous] complaint.... That the facts that were disclosed in the [previous] complaint and the facts that formed the basis for Siller's action were the same, does not, however, mean that Siller actually derived his allegations from the allegations in the [previous] complaint. It is certainly possible that, as Siller contends, Siller actually learned

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[7] The Hilton Heal Island Packet did not report any medically unnecessary catheterizations.

> of BD's alleged fraud entirely independently of the [previous] suit, and derived his allegations from that independent knowledge.

Id. at 1349. " *Siller,* however, offers no guidance on the issue of whether, for the [public disclosure] bar to apply, the information derived by the relator must be total or need only be partial." *Ackley,* 76 F.Supp.2d at 660. The United States District Court for the District of Maryland has held "that allegations partially based upon (*i.e.* partially derived from) public disclosures suffice for imposition of the public disclosure bar." *Id.* at 662. The *Ackley* court said, "This view ... accords with the holding of every Circuit that has addressed the issue.... The Court, moreover, believes practical considerations favor application of a 'partially based on' rule." *Id.* at 661.[8] The court is persuaded by the reasoning in *Ackley;* thus, if any part of Plaintiff's complaint is based on public disclosures, Plaintiff must demonstrate he is an original source in order for this court to have jurisdiction.

It is true that several of the allegations in

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[8] The court elaborated on the practical considerations: adopting a "partially based upon" rule will prevent a relator from proceeding simply adding a few previously undisclosed facts to numerous facts previously disclosed. *Ackley,* 76 F. Supp. 2d at 661. Furthermore, "a potential logistical nightmare would ensue" if the court had to "pick and choose among those facts derived from public disclosures and those not so derived, and then to try the case requiring proof of direct and independent knowledge as to some facts but not as to others-particularly in cases where many facts and transactions are likely to be interwoven." *Id.*

Plaintiff's complaint are substantially similar to the facts reported in the *Hilton Head Island Packet*. However, as the Fourth Circuit's opinion in *Siller* instructs, the similarity of the facts in the relator's complaint and the public disclosure does not indicate the relator's action is based on the public disclosure. *Siller*, 21 F.3d at 1348-49. Plaintiff presents evidence that he spoke with a United States Attorney prior to the articles appearing in the *Hilton Head Island Packet*. In his declaration, Plaintiff states,

> In November 2002 or thereafter, I notified the United States Attorney for the District of South Carolina of Defendants' false claims. The initial contact was made on or about November 6, 2002. I spoke with United States Attorney Jennifer Aldrich by telephone and described the allegations now reflected in the Complaint. Subsequently I had additional discussions with Ms. Aldrich and an investigator from the Office of [the] Inspector General, Mr. Brian Dimmler.

(Pl.'s Decl. ¶ 4.) Plaintiff thus states, under penalty of perjury, that he spoke with a United States Attorney in November 2002 and "described the allegations now reflected in the Complaint." (Pl.'s Decl. ¶ 4.)

Furthermore, Plaintiff's Complaint alleges wrongdoing never mentioned in the *Hilton Head Island Packet*. For example, Plaintiff alleges HHMCC developed an extended care and

rehabilitation program during his tenure there. (Compl.¶ 87.) He states that hospital administrators pressured him and HHMCC's medical staff to fill the beds regardless of whether patients required those services and alleges upon information and belief that Defendants billed Medicare for these services without medical necessity. (Compl.¶ 87.) In addition, Plaintiff alleges HHMCC, in requiring its medical staff to chart every medical condition of the patient as being treated regardless of whether or not the condition actually was treated, improperly billed Medicare for services not provided. (Compl.¶ 91.) He states he has knowledge of Johnston's wrongdoing as a result of a conversation he had with Bruns shortly after starting work at HHMCC and participation in the internal review committee. (Pl's Decl.¶¶ 18-20, 27.) Dr. Lowman further alleges that he discontinued referring his patients to Johnston and HHMCC's Catheterization Laboratory and instead began referring them to the Department of Radiology as a result of the wrongful procedures. However, Bruns notified Plaintiff that his patients should not be referred to the Department of Radiology because it was not owned by Defendants and therefore drained money away from them. (Compl.¶ 84.)

Several factors weigh in favor of finding Plaintiff's Complaint is not based on public disclosure. First, Plaintiff submits evidence that he reported the factual allegations contained in his Complaint to a United States Attorney in 2002, prior to the articles in the *Hilton Head Island Packet*. Second, Plaintiff's Complaint and Declaration reveal

how he could have learned of Defendants' malfeasance as a result of his position with HHMCC. Lastly, the Complaint alleges malfeasance far beyond what is contained in the newspaper articles. This is not a case where Plaintiff simply lifted his allegations from a public disclosure. The court therefore has jurisdiction over Plaintiff's suit because the court finds the *qui tam* suit is not based upon the public disclosure. *See* 31 U.S.C. § 3730(e)(4); *see also Minn. Ass'n of Nurse Anesthetists*, 276 F.3d at 1042; *Reagan*, 274 F.Supp.2d at 841

B. Motion to Dismiss Pursuant to Rule 12(b)(6)[9]

Defendants argue the court should grant their Motion to Dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure for two reasons: (1) even if Plaintiff's allegations are true, "a violation of state [Certificate of Need] regulations is not and cannot be a false claim;" and (2) the statute of limitations precludes Plaintiff's False Claims Act causes of action premised on alleged violations occurring on or before September 1, 1999. (Hospital Defs.' Mot. at 2.) Plaintiff, on the other hand, argues that false certifications to Medicare are actionable and that Defendants falsely certified their compliance with the law. (Pl.'s Mem. in Opp'n at 28.) Plaintiff also argues the court should not grant the

[9] Because matters outside the pleadings are presented to and not excluded by the court, the court will treat the Motions to Dismiss pursuant to Rule 12(b)(6) as Motions for Summary Judgment.

Motion to Dismiss because Plaintiff brought this action within the statutory time period. (Pl.'s Mem. in Opp'n at 31.)

The statute of limitations provision of the False Claims Act provides as follows:

> A civil action under section 3730 may not be brought-
>
> > (1) more than 6 years after the date on which the violation of section 3729 is committed, or
> >
> > (2) more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances, but in no event more than 10 years after the date on which the violation is committed,
>
> whichever occurs last.

31 U.S.C. § 3731(b).

Courts disagree over whether *qui tam* plaintiffs may take advantage of the equitable tolling provision codified in § 3731(b)(2). Some courts hold that the tolling provision is inapplicable to *qui tam* plaintiffs. *See U.S. ex rel. Sikkenga v. Regence Bluecross Blueshield of Utah*, 472 F.3d 702, 725-26

(10th Cir.2006); *U.S. ex rel. Amin v. George Washington Univ.*, 26 F.Supp.2d 162, 172 (D.D.C.1998) ("The plain meaning of the statute supports the conclusion that the three year knowledge requirement contained in 31 U.S.C. § 3731(b)(2) only applies to cases in which the government intervenes."); *U.S. ex rel. Thistlethwaite v. Dowty Woodville Polymer, Ltd.*, 6 F.Supp.2d 263, 265 (S.D.N.Y.1998) ("By the clear statutory language, the Relator's time is not extended to three years after the United States official learns of the violation. That provision only applies to the government."). Other courts have held that the tolling provision in § 3731(b)(2) applies to cases brought by relators. *See U.S. ex rel. Hyatt v. Northrop Corp.*, 91 F.3d 1211, 1216 (9th Cir.1996) ("[W]e conclude that Congress did not intend to restrict the tolling provisions of the [False Claims] Act to apply to suits brought by the Attorney General alone, but intended the tolling provision to apply to *qui tam* plaintiffs as well."); *U.S. ex rel. Downy v. Corning, Inc.*, 118 F.Supp.2d 1160, 1170 (D.N.M.2000) (adopting the *Hyatt* approach);[10] *U.S. ex rel. Bidani v. Lewis*, No. 97 C 6502, 1999 WL 163053, at *9 (N.D.Ill. Mar. 12, 1999) ("[Section] 3731(b)(2) is construed as applying to actions brought by a qui tam plaintiff and in which the government has not joined. In such cases, the three-year knowledge rule is measured by the knowledge

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[10] The United States Court of Appeals for the Tenth Circuit did not adopt this approach in *Sikkenga*. *See* 472 F.3d 702. Instead, the Tenth Circuit held that § 373 l(b)(2) "was not intended to apply to private qui tam relators at all." *Id.* at 725.

of the qui tam plaintiff."). Furthermore, one district court has held that § 3731(b)(2) applies to private relators and that the three-year period begins to run not when the relator has knowledge of the violation but when knowledge of that violation is communicated to the appropriate United States official. *See U.S. ex rel. Colunga v. Hercules Inc.*, No. 89-CV-954 B, 1998 WL 310481, at *3-4 (D.Utah Mar. 6, 1998)[11]

This court need not decide whether the equitable tolling provision codified in § 373 l(b)(2) applies to actions brought by *qui tarn* plaintiffs because assuming the provision applies, Plaintiffs claims are still barred by the statute of limitations. In his Memorandum in Opposition to Defendants' Motions to Dismiss, Plaintiff frequently cites *Hyatt* and asserts that while the Fourth Circuit has not ruled on the issue, "it appears aligned with *Hyatt.*" (Mem. in Opp'n at 33.)[12] Plaintiff,

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[11] The United States Court of Appeals for the Tenth Circuit did not adopt this approach in *Sikkenga. See All* F.3d 702. Instead, the Tenth Circuit held that § 373 l(b)(2) "was not intended to apply to private qui tarn relators at all." *Id.* at 725.

[12] Plaintiff cites *United States exrel. Milam v. University of Texas M.D. Anderson Cancer Center*, 961 F.2d 46 (4th Cir. 1992), for support in asserting that the Fourth Circuit appears aligned with *Hyatt*. Plaintiff states,

> [T]he FCA is concerned solely with false claims submitted to the Government and provides for suit brought by individuals, but only as relators in the name of the Government. These and other considerations compelled the court to hold that the United States is the real party in interest in any FCA suit, even where it permits a *qui tarn* relator to pursue the action on its behalf.

however, fails to discuss a relevant portion of the *Hyatt* opinion. In *Hyatt,* the Ninth Circuit held § 3731(b)(2) applies to *qui tarn* plaintiffs. *Hyatt,* 91 F.3d at 1216. The court then addressed "what event initiates the running of the statue of limitations against a *qui tarn* plaintiff under 31 U.S.C. § 373 l(b)(2)." *Id.*

Noting the "rationale behind tolling requires that the statue of limitations start to run when the

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(PL's Resp. in Opp'n at 33 (internal quotation marks and citations omitted).)

In *Milam,* the issue before the court was "whether the inapplicability of the Eleventh Amendment to suits brought by the United States extends to actions brought on the United States' behalf by *qui tarn* relators." *Milam,* 961 F.2d at 47. The relator filed suit against M.D. Anderson Cancer Center of the University of Texas (the "Center"), and the relator did not contest the Center's assertion that it was an agency of the State of Texas. *Id.* at 48. The Center moved to dismiss, arguing immunity pursuant to the Eleventh Amendment, but the district court denied the motion. *Id.*

> On appeal, the Fourth Circuit affirmed the district court and stated,
>
> When a *qui tarn* action is brought on its behalf, the government may choose to intervene and pursue the action itself or to permit the relator to pursue the action without its intervention. Whichever course it chooses, the government is entitled to the lion's share of any amount recovered.
>
> . . .
>
> We hold that the United States is the real party in interest in any False Claims Act suit, even where it permits a *qui tarn* relator to pursue the action on its behalf. The Center's Eleventh Amendment immunity defense therefore evaporates, because states may be sued in federal courts by the United States. *Id.* at 48, 50.

plaintiff acquires knowledge of the wrongful activity," the Ninth Circuit held the plaintiffs cause of action barred because the six-year general limitation period had expired and because his suit was filed more than three years after he knew of the alleged wrongdoing. *Id.* at 1217-18. The court said,

> Once the *qui tarn* plaintiff has the requisite information, he cannot sleep on his rights. He is charged with responsibility to act under the circumstances. Thus, as to the *qui tarn* plaintiff, the three-year extension of the statute of limitations begins to run once *qui tarn* plaintiff knows or reasonably should have known the facts material to his right of action. . . . Hyatt's interpretation of the tolling provision would permit *qui tarn* relators to control the length of their own limitations period by withholding their allegations until they are prepared to sue. Under this theory, *qui tarn* relators could wait a full ten years after learning of the deceit before suing. This would frustrate the purposes of a limitation period and the purposes of the Act.

Id. at 1217-18.

In the case *subjudice,* Plaintiff began working at HHMCC on or about March 10,1997, and he states he was summoned to a meeting with Bruns several days after he began working there in which Bruns told Plaintiff about Defendant Johnston's unlawful and unnecessary performance of procedures. (Pl.'s Decl. ¶¶ 17-20.) Plaintiff also states that he was asked to participate in an internal review committee to review Defendant Johnston's files several months after he started working at HHMCC. (Pl.'s Decl. ¶ 27.) Plaintiff

resigned his position effective May 14,1999. (Pl's Decl. ¶ 41.) He brought suit pursuant to the False Claims Act on September 1,2005. Plaintiff thus did not bring his suit within the time frame established by the statute of limitations in 31 U.S.C. § 373 l(b). Assuming, but not deciding, the equitable tolling provision applies to Plaintiff,

> [A] civil action under the [False Claims] Act brought by a *qui tarn* plaintiff must be commenced no more than (1) six years after the date on which the FCA violation is committed or (2) three years after the date when facts material to the right of action are known or reasonably should have been known by the *qui tarn* plaintiff, whichever occurs last. A suit under the Act must, in any event, be brought no more than ten years after the date on which the violation occurred.

Hyatt, 91 F.3d at 1218. Plaintiff knew of the material facts shortly after he began his employment at HHMCC, but he filed this action more than six years after the alleged violations occurred and more than three years after he knew the relevant facts.[13] Even assuming the statute of limitations began to run on May 14, 1999, it has run, and Plaintiffs suit is therefore barred.[14]

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[13] While Plaintiff asserts that the violations continued after he left HHMCC, he can have no personal knowledge of these alleged violations. *See Foster v. Savannah Comm 'n,* 140 Fed. App'x 905, 907 (1 lth Cir. 2005).

[14] Finding the statute of limitations determinative, the court does not address Defendants' argument that a violation of a state Certificate of Need regulation cannot be a false claim. Likewise,

CONCLUSION

It is therefore **ORDERED,** for the foregoing reasons, that the Hospital Defendants' Motion for Summary Judgment and Defendant Johnston's Motion for Summary Judgment are **GRANTED.**

AND IT IS SO ORDERED.

/s/ Patrick Michael Duffy
United States District Judge

Charleston, South Carolina
April 24, 2007

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the court does not address Defendants' argument that Plaintiff failed to plead fraud with particularity.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 07-1485 (L)
(9:05-cv-02533-PMD)

UNITED STATES OF AMERICA, EX REL. BRUCE G. LOWMAN,
PLAINTIFF – APPELLANT

v.

HILTON HEAD HEALTH SYSTEM LP; TENET HEALTHCARE CORPORATION, FORMERLY KNOWN AS NATIONAL MEDICAL ENTERPRISES, FORMERLY KNOWN AS AMERICAN MEDICAL INTERNATIONAL INCORPORATED; TENET PHYSICIAN SERVICES-HILTON HEAD INCORPORATED; HILTON HEAD MEDICAL GROUP CARDIOLOGY LLC; JAMES DOUGLAS JOHNSTON, INDIVIDUALLY AND AS A MEMBER OF THE MEDICAL STAFF,
DEFENDANTS – APPELLEES

PETITION FOR REHEARING FROM THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

[Filed Jan. 20, 2009]

TAXPAYERS AGAINST FRAUD EDUCATION FUND,
AMICUS SUPPORTING APPELLANT

ORDER

The petition for rehearing en banc was circulated to the full Court. No poll was requested. The Court denies the petition for rehearing en banc.

For the Court

/s/ Patricia S. Connor, Clerk